Supreme Court, U.S.
FILED
NOV 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-5525

CLYDE CADE,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

CHARLES A. GRADDICK
Alabama Attorney General

WALTER S. TURNER
Chief Assistant Alabama
Attorney General

LINDA C. BRELAND
Assistant Alabama Attorney
General

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF CASES.....iii

OPINIONS BELOW..... 2

QUESTIONS PRESENTED..... 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 5

JURISDICTION..... 5

STATEMENT OF THE CASE..... 5

STATEMENT OF THE FACTS..... 6

SUMMARY OF THE ARGUMENT..... 8

ARGUMENT..... 10

I. The Statutory Preclusion from Consideration of Lesser Included Offenses by a Jury in a Capital Case is Constitutional..... 10

II. A Provision which Requires the Jury to Impose a "Sentence" of Death Does Not Render the Statute Unconstitutional and Does Not Make the Statute "Mandatory."..... 14

III. The Structure of Alabama's Death Statute Insures that at Least One Aggravating Circumstance Will Be Proven Beyond a Reasonable Doubt Before a Defendant Can Be Sentenced to Death..... 18

IV. The Statutory Requirements that the Judge Sentence the Defendant Pursuant to a Verdict of Guilty by the Jury and that he Consider the Jury Verdict in Weighing the Evidence Do Not Render the Statute Unconstitutional..... 23

V. Alabama's Death Penalty Statute Allows the Sentencing Authority to Consider as a Mitigating Factor any Aspect of a Defendant's Character and Record, any of the Circumstances of the Offense, and any other Relevant Evidence in Mitigation that the Defendant Proffers as a Sentence Less than Death..... 27

Page

VI. The Alabama Appellate Courts Exercise Comparative Appellate Review of Sentences in Capital Cases and Independently Weigh the Aggravating and Mitigating Circumstances at the Appellate Level to Insure Proper Sentencing..... 33

VII. Alabama's Death Penalty Act Does Not Provide a Mandatory Sentencing Procedure..... 40

VIII. The Trial Judge Did Not Consider the Jury's Death Sentence as an Aggravating Circumstance in Fixing the Punishment at Death..... 42

CONCLUSION..... 45

CERTIFICATE OF SERVICE..... 46

TABLE OF CASES

Page

Ashlock v. State, 367 So. 2d 560, 561 (Ala. Cr. App. 1979) 34-35

Beck v. State, 365 So. 2d 985, 1002 (Ala. Cr. App. 1978) 21, 25-26, 37, 39, 41

Gilbert Franklin Beck v. Alabama, No. 78-6621 ..... 10, 31

Roy Frank Clements v. State, 370 So. 2d 708 (Ala. Cr. App. March 16, 1978) rev'd on other grounds Ex Parte: Roy Frank Clements, ___ So. 2d ___ (Ala. Jan. 26, 1979) 39

Evans v. Britton, 472 F. Supp. 707 (D.C. Ala. 1979) 25

Evans v. State, 361 So. 2d 666, 667 (Ala. 1978) 33, 36

Leslie Evans v. State, 362 So. 2d 1284 (Ala. Cr. App. 1978) 33

Ex Parte: Recardo Cook, ___ So. 2d ___ (Ala. Sept. 15, 1978) 21, 31, 34

Furman v. Georgia, 408 U.S. 238, 411 ..... 8, 11

Gardner v. Florida, 430 U.S. 349 (1977) 33

Gregg v. Georgia, 428 U.S. 153 (1976) 27, 31, 38

J. B. Hubbard v. State, ___ So. 2d ___ (Ala. Cr. App. May 1, 1979) 35

Jacobs v. State, 361 So. 2d 607, 631 (Ala. Cr. App. 1978) 13, 15, 18, 24, 26, 29-32, 36, 38-41

Page

Jurek v. Texas, 428 U.S. 262, 279 (1976).....12, 27, 31-33

Woodrow Wilson Keller, Jr. v. State, ___ So. 2d ___ (Ala. Cr. App. Feb. 20, 1979).....34-35

Lockett v. Ohio, 98 S. Ct. 2954 (1978).....15, 29-32

Willie Lee Mack v. State, ___ So. 2d ___ (Ala. Cr. App. July 25, 1978).....35

Eddie Barnard Neal v. State, ___ So. 2d ___ (Ala. Cr. App. May 1, 1979).....33, 38

Proffitt v. Florida, 428 U.S. 242 (1976).....20, 22, 27, 31-32

Pugh v. Rainwater, 572 F. 2d 1053 (5th Cir. 1978) (en banc).....22

Herbert Lee Richardson v. State, ___ So. 2d ___ (Ala. Cr. App. Oct. 30, 1978).....35-37

Roberts v. Louisiana, 428 U.S. 325, 335 (1976).....12, 16

Spinkellink v. Wainwright, 578 F. 2d 582, 610 (5th Cir. 1978).....20, 22

State v. Dixon, 283 So. 2d 1, 9.....20

Roger Scott Thomas v. State, ___ So. 2d ___ (Ala. Cr. App. March 27, 1979).....37

U. S. v. Nelson, 563 F. 2d 928 (C.A. Minn. 1977).....11

U. S. v. Whitaker, 447 F. 2d 314, 144 U.S. App. D.C. 344 (1971).....11

Page

Universal Amusement Co. v. Vance, 587 F. 2d 159, 166 (5th Cir. 1978) (en banc) 22

Woodson v. North Carolina, 428 U.S. 280, 302 (1976) 12, 16

Roosevelt Youngblood v. State, ___ So. 2d ___ (Ala. Cr. App. March 6, 1979) 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

CLYDE CADE,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction and sentence has not yet been reported. The opinion of the Supreme Court of Alabama affirming the conviction and sentence also have not been reported.

QUESTIONS PRESENTED

I.

WHETHER ALABAMA'S STATUTORY PRECLUSION FROM CONSIDERATION OF LESSER INCLUDED OFFENSES BY A JURY IN A CAPITAL CASE IS CONSTITUTIONAL?

II.

WHETHER ALABAMA'S DEATH PENALTY STATUTE IS RENDERED UNCONSTITUTIONAL BY THE SIMPLE FACT THAT IT REQUIRES THE JURY TO STATE IN ITS VERDICT THAT IT "FIXES THE PUNISHMENT AT DEATH"?

III.

WHETHER THE STRUCTURE OF ALABAMA'S DEATH STATUTE INSURES THAT AT LEAST ONE AGGRAVATING CIRCUMSTANCE WILL BE PROVED BEYOND A REASONABLE DOUBT BEFORE A DEFENDANT CAN BE SENTENCED TO DEATH?

IV.

WHETHER THE STATUTORY REQUIREMENT THAT THE JUDGE SENTENCE THE DEFENDANT PURSUANT TO A VERDICT OF GUILT BY THE JURY AND THAT HE CONSIDER THE JURY VERDICT IN WEIGHING THE EVIDENCE RENDERS THE STATUTE UNCONSTITUTIONAL?

V.

WHETHER ALABAMA'S DEATH STATUTE ALLOWS THE SENTENCING AUTHORITY TO CONSIDER AS A MITIGATING FACTOR ANY ASPECT OF A DEFENDANT'S CHARACTER AND RECORD, ANY OF THE CIRCUMSTANCES OF THE OFFENSE, AND ANY OTHER RELEVANT EVIDENCE IN MITIGATION TOWARD A SENTENCE LESS THAN DEATH?

VI.

WHETHER THE ALABAMA APPELLATE COURTS EXERCISE COMPARATIVE APPELLATE REVIEW OF SENTENCES IN CAPITAL CASES AND INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AT THE APPELLATE LEVEL?

VII.

WHETHER ALABAMA'S DEATH PENALTY ACT CONSTITUTES A MANDATORY SENTENCING PROCEDURE?

VIII.

WHETHER THE TRIAL JUDGE CONSIDERED THE JURY DEATH SENTENCE AS AN AGGRAVATING CIRCUMSTANCE IN FIXING THE PUNISHMENT AT GUILT?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the Alabama Death Penalty Act, which is codified as Code of Alabama 1975, §13-11-1, et seq., and which is set out in full on pages 3-7 of Petitioner's brief.

JURISDICTION

The Petitioner invokes jurisdiction pursuant to 28 U.S.C. §1247(3).

STATEMENT OF THE CASE

The Petitioner, Clyde Cade, was indicted by the Grand Jury of Geneva County, Alabama on August 31, 1977, for the murder of L. D. Sizemore, Sheriff of Geneva County, Alabama. Petitioner was tried under Code of Alabama 1975, §13-11-1, et seq., which makes the murder of a sheriff or peace officer of any kind a capital offense if such peace officer is on duty or performing a job-related act.

After a three-day trial, ending March 15, 1978, the jury found the Petitioner guilty and fixed his punishment at death. On March 27, 1978, the trial judge held a post-conviction sentencing as required by §13-11-3, Code of Alabama 1975, to determine whether Petitioner would be sentenced to death or to life imprisonment without parole. At the sentencing hearing the State offered evidence of Petitioner's prior record through pre-sentence reports, a report prepared by the Alabama Board of Pardons and Parole, and a statement taken by a state investigator (R. 523-530).

The Petitioner presented no mitigating evidence, although his attorney did state to the court that Petitioner had severe emotional and personality problems which should mitigate the imposition of the death penalty (R. 530-531). After conducting the sentence hearing, the trial court concluded that the Petitioner's sentence should be death, and entered written findings supporting that sentence (R. 78).

Petitioner was given an automatic review of his conviction and sentence in an appeal to the Alabama Court of Criminal Appeals. On November 21, 1978, the Alabama Court of Criminal Appeals affirmed Petitioner's conviction and sentence. Petitioner's petition for rehearing was denied on January 30, 1979.

Petitioner filed a petition for writ of certiorari with the Alabama Supreme Court, and this petition was granted as a matter of right, as required by Rule 39(c) of the Alabama Rules of Appellate Procedure, on March 6, 1979. On May 25, 1979, the Alabama Supreme Court affirmed Petitioner's conviction and sentence.

STATEMENT OF THE FACTS

The facts surrounding the killing of Sheriff L. D. Sizemore are set out in detail in the opinion of the Court of Criminal Appeals of Alabama, which is attached as Appendix A to Petitioner's brief. The following is a summary of those facts.

On the afternoon of August 3, 1977, Clyde Cade went to the home of Diane Butts, in a small community near Geneva, Alabama, and asked to see her sister Shirley. When told that Shirley was not home, appellant replied, "I'm going to kill her" and opened a pocket knife. Mrs. Butts pushed him out the door. Cade then began pulling on a window screen

outside. Mrs. Butts threw a drink bottle at him shattering the window. When Shirley returned hom a short time later, Cade took a piece of board out to her car and said he was going to knock out the windshield. Shirley left and went to a neighbor's house, Mr. L. C. Thomas, and told him about the disturbance. Thomas then called the Geneva County sheriff's office.

A short time later, Sheriff Sizemore arrived at the Butts' home and called for Clyde to come out of the house. Cade came out, saying, "I ain't going nowhere. I ain't going to jail." Then Sheriff Sizemore said, "Turn around and let me search you." And Cade again said, "I ain't going to jail." According to the combined testimony of three eyewitnesses, Cade then grabbed Sheriff Sizemore around the waist and they fell. Cade came up with the Sheriff's gun and told the Sheriff to leave. Sizemore threw up his hands and said, "Okay. I give up." He then got in the car, there were several shots, and Sheriff Sizemore was found dead in his car. Cade turned around and ran through some woods behind the Butts' home. Officers later found him in his house lying down in the bedroom, with a revolver underneath his head. Ballistics tests reflected that two bullets recovered from Sheriff Sizemore's head and neck were fired from this revolver.

Cade claimed that he did not remember any of the circumstances surrounding the shooting and contended that he had mental problems resulting from head injuries. The State called a psychiatrist who had evaluated Cade to testify that in his opinion Cade was sane at the time he committed the act and was able to appreciate the difference between right and wrong.

SUMMARY OF THE ARGUMENT

The Alabama death penalty statute does not allow the jury to return a verdict for a lesser included offense and thus avoids the kind of jury discrimination deemed unconstitutional in Furman v. Georgia, 408 U.S. 238, 411. The fact that juries are not allowed to consider lesser included offenses does not make it likely that jurors will sentence to death a person who has not been proved guilty of every element of a capital offense. In order to do so, jurors would have to violate their oaths, to ignore the instructions of the trial judge, and to act in a manner contrary to the historical behavior of juries. There is no evidence that this has happened or will happen. In any event, the Petitioner has not shown that there was any evidence upon which to base a charge for a lesser included offense.

The provision in Alabama's statute which requires the jury to "fix the punishment at death," is there to impress upon jurors the seriousness and gravity of what they are doing when they render a verdict of guilty. Such a provision does not render the statute "mandatory" and unconstitutional but, to the contrary, strengthens the statute by further insuring that a jury will not arbitrarily or discriminatorily convict a defendant.

There is no court decision that requires a certain standard of proof at a sentencing hearing after a jury has been convinced beyond a reasonable doubt that a defendant is guilty. Even so, the structure of Alabama's death statute insures that at least one aggravating circumstance will be proved beyond a reasonable doubt before a defendant can be sentenced to death.

Alabama's provision for judicial rather than jury sentencing in capital cases is constitutional and is a

superior method of sentencing. Prior sentencing decisions reflect that Alabama trial judges do act responsibly in sentencing capital offenders, and that they are not unduly influenced by public pressure or by the jury verdict of guilt.

The trial judge is in no way precluded from considering as a mitigating factor at the sentencing hearing any aspect of a defendant's character or record, any of the circumstances of the offense, or any other relevant evidence in mitigation of the death sentence that a defendant desires to submit. The trial judge can give these factors mitigating weight independent from the statutorily enumerated mitigating factors.

The Alabama Appellate Courts review capital cases for the dual purposes of insuring a fair and impartial trial and insuring consistency and uniformity in sentencing. Recent appellate court decisions reflect this comparative review of death sentences.

Alabama's death penalty act is not mandatory because the sentencing authority has the option of sentencing a convicted capital felon to life imprisonment without parole. A review of cases tried under Alabama's capital murder statute reflects that a sentence of life imprisonment has been imposed in a number of instances.

The trial judge considered the verdict of guilt by the jury as a part of the total surrounding circumstances of this case. There is no evidence to support an assumption that he considered the jury verdict as an aggravating circumstance. The language of his written findings reflects that the jury verdict was considered separately from the aggravating and mitigating circumstances.

ARGUMENT

I.

THE STATUTORY PRECLUSION FROM CONSIDERATION OF LESSER INCLUDED OFFENSES BY A JURY IN A CAPITAL CASE IS CONSTITUTIONAL.

Under Alabama's death penalty statute, Code of Alabama 1975, §§13-11-1 through 13-11-9, there are no lesser included offenses. Section 13-11-2(a) expressly precludes them.

This Honorable Court has granted certiorari in the case of Gilbert Franklin Beck v. Alabama, No. 78-6621, to review the constitutionality of the preclusion of lesser included offenses. The Court granted certiorari on the specific limited question that follows:

> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included offense, and when the evidence would have supported such a verdict?"

The constitutional challenge is limited here to cases where there is evidence upon which to base a conviction of a lesser included offense. Conversely, where there is not sufficient evidence to support a conviction for a lesser included offense, such a charge would not be properly given.

In the instant case, Petitioner has neither alleged nor demonstrated to the Court that there is any evidence upon which to base a conviction for a lesser included offense. Yet Petitioner does not dispute that lesser included offenses must be factually established in order to be charged. Indeed, the evidence is clear that Clyde Cade shot Sheriff Sizemore while the Sheriff was attempting to arrest him. The evidence is also clear that the Sheriff was on duty and performing a job-related act. While there was some evidence presented by

Petitioner on the issue of his sanity, the jury had the option of finding Cade not guilty by reason of insanity.

The law is settled that a defendant is entitled to a charge on a lesser crime only if there is some evidence which would justify a conviction of the lesser offense, and only if proof on the elements differentiating the two crimes is sufficient. See, e.g., U. S. v. Nelson, 563 F. 2d 928 (C.A. Minn. 1977); U. S. v. Whitaker, 447 F. 2d 314, 144 U.S. App. D.C. 344 (1971).

Petitioner maintains that the Alabama Legislature drafted the death statute in an attempt to meet the requirements of Furman v. Georgia, 408 U.S. 238 (1972), but that the Legislature misinterpreted Furman. It is true that Alabama's death statute was drafted in light of Furman and to avoid the pitfalls of jury discrimination prohibited by Furman. The most effective way to insure that the jury was not allowed the unfettered discretion to apply the death penalty in a discriminatory manner was to preclude their consideration of lesser included offenses. The preclusion of lesser included offenses from consideration by the jury avoids the pitfalls denounced in Furman, and thereby promotes sentencing that is consistent with the Constitution.

Alabama's statute provides for judicial sentencing rather than jury sentencing. The advantages of judicial sentencing are discussed at pages 25-26 of this brief. No capital punishment system which permits a jury to return a conviction on a lesser included offense in a capital case will ever attain the full advantages of judicial sentencing. As long as the jury has the kind of discretion which the availability of lesser included offenses allows them, the inconsistency denounced in Furman will be present and the greater consistency of judicial sentencing and appellate review of sentencing

will always be undermined. See, Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion). As stated in Woodson v. North Carolina, 428 U.S. 280, 302 (1976), any capital sentencing scheme in which jurors are tempted by the availability of lesser included offenses merely papers over the problem of de facto jury discretion.

In his brief Petitioner speculates that the preclusion of lesser included offenses might encourage juries to convict a defendant of a lesser offense which should have been, but was not, included. Such speculation is unpersuasive for several reasons. First, there is absolutely no evidence that such irresponsibility by jurors has ever occurred or will ever occur. In this case, the trial judge repeatedly and extensively instructed the jury that the jury as a whole and each individual juror would have to be convinced beyond a reasonable doubt and to a moral certainty of the existence of all the elements of a capital offense before the jury could convict the defendant (R. 497, 498, 516). The jurors were properly instructed on this point, and "it should not be assumed that juries will disobey or nullify their instructions." Jurek v. Texas, 428 U.S. 262, 279 (1976) (concurring opinion of Justice White, joined by Chief Justice Burger and Justice Rehnquist).

Experience directly contradicts Petitioner's assertion that the jury tends to resolve its doubts in favor of conviction. The available evidence indicates that because of compassion, juries tend, if anything, to resolve such questions in favor of the accused. The jury nullification data relied upon to strike down mandatory death penalty sentences in Woodson v. North Carolina, 428 U.S. 280, 289-293 (plurality opinion), demonstrates the extent to which juries will go to spare defendants from capital punishment. In the fact of such evidence, Petitioner's argument that

jurors would callously elect to send to his death a man whom they concluded was not guilty of a capital offense is totally unsupported.

Finally, if the jury finds that a defendant is guilty of some offense other than the capital offense charged, the jury is not faced with what Petitioner calls the "Hobson's choice" of acquitting a criminal or of returning a verdict sentencing a man to death for a capital offense of which he is not guilty. Instead, the Alabama statutes specifically provide that the jury can refuse to agree on a verdict or on the sentence of death and thereby cause a mistrial. Code of Alabama 1975, §13-11-2(c).

Petitioner argues in a footnote on p. 17 of his brief that, even in a mistrial each juror must make a choice, and that the option of mistrial is meaningless because no capital jury in Alabama has been instructed that a mistrial is one of its options.

Apparently, Petitioner overlooked the trial judge's instruction to the jury in this case (R. 513) that there were four possible outcomes, one of which was a mistrial. The judge first instructed the jury regarding the three other possible outcomes—"guilty," "not guilty by reason of insanity," or "not guilty." The trial judge then stated:

> "If you fail to agree on a verdict of guilty or not guilty, or if you fail to agree on the affixing of the penalty of death, then the court would declare a mistrial. So, those are the four possible outcomes after you have begun your deliberation." (R. 513)

A similar charge was given by the trial judge in Jacobs v. State, 361 So. 2d 607, (Ala. 1978). The Court there further instructed the jury that Jacobs could be reindicted for a lesser included offense.

The option of mistrial does not require that a juror make a "Hobson's choice." It simply requires that he make no choice at all—that he fail to reach a decision. This

is a very real, very important, option for the juror and safeguard for, the defendant. If a single juror does not agree with the majority, he is not required to vote to convict or acquit. He can simply fail to agree with the majority and cause a mistrial. There have been at least three mistrials to date under the Alabama statute.

In summary, the inclusion of lesser included offenses in a capital sentencing system is not constitutionally required. Preclusion of lesser included offenses serves important constitutional goals, and there is no evidence whatsoever that it will result in the conviction of a defendant who is not guilty of a capital offense. In any event, the Alabama statutory system contains an important safety-valve in that a mistrial can be declared if a jury is unable to agree on a verdict or on the sentence of death. After such a mistrial, the defendant can be re-tried for the capital offense or he can be reindicted for a non-capital offense.

II.

A PROVISION WHICH REQUIRES THE JURY TO IMPOSE A "SENTENCE" OF DEATH DOES NOT RENDER THE STATUTE UNCONSTITUTIONAL AND DOES NOT MAKE THE STATUTE "MANDATORY."

Petitioner asserts that a capital sentencing scheme which requires a jury, upon conviction, to "fix the punishment at death," is unconstitutional in that it encourages arbitrary and wanton jury discretion. He maintains that juries faced with "sentencing" a person to death will be pressured into acquitting guilty defendants whom they feel do not deserve to die, and in convicting defendants who are not guilty of capital offenses, but who are guilty of a lesser included offense.

There is absolutely no evidence to substantiate this charge. To the contrary, the provision that the jury "fix the punishment at death," is for the purpose of insuring that the jury consider the seriousness of their verdict and impose or withhold the death penalty appropriately.

While the statute is phrased such that the jury must "fix the punishment at death," this is only an adjudication of guilt and not a sentence. The jury's function is to determine guilt or innocence, but the judge is the actual sentencing authority. Jacobs v. State, 361 So. 2d 607, 631 (Ala. 1978).

However, even though the jury is not the sentencing authority, the requirement that any guilty verdict it returns "fix the punishment at death" serves a very important function. Because of the profound difference between death and other punishments, greater reliability is necessary in capital cases. See, Lockett v. Ohio, 98 S. Ct. 2954, 2964 (1978) (plurality opinion). The fact-finding process should not be taken lightly. In a capital case, a procedural device is valuable if it helps insure that jurors vote to convict only those defendants of whose guilt the jurors are truly convinced beyond any reasonable doubt and to a moral certainty. The best way to insure that jurors are aware of their awesome task and its terrible responsibilities is to confront them with it. That is what the statutory provision accomplishes when it requires the jury to phrase a guilty verdict in terms of the punishment of death, even though the jury is not the sentencing authority. Any capital sentencing system in which the jury is tempted to shift its responsibility to the judge runs the risk that guilt adjudication will not be as reliable as possible. Under Alabama's system, the jury has more reason to realize its serious responsibility and to discharge it with care.

This Court's decisions in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), are not authority for invalidating Alabama's new Death Penalty Act.

Petitioner's argument is that the Woodson and Roberts cases are authority for the proposition that under Alabama's statute juries might exercise a "de facto sentencing discretion" which would lead to unconstitutional arbitrariness and capriciousness in the infliction of the death penalty. However, the Alabama statute is constitutionally different from the North Carolina and Louisiana statutes which were struck down in Woodson and Roberts. Those statutes were seen as permitting or even encouraging jurors to use de facto sentencing discretion through the device of convicting for lesser included offenses. Indeed, the Louisiana statute required that juries be instructed on lesser included offenses even when the evidence would not support such an instruction. Alabama's statute contains no lesser included offenses. Code of Alabama 1975, §13-11-2(a). Jury nullification through lesser included offenses is not possible under the Alabama statute. Instead, the only possibility for jury nullification is through acquittal or mistrial. The offenses which are punishable by death under the Alabama statute are very narrowly drawn to include only the most serious and dangerous crimes. There is simply no real prospect that a jury, convinced beyond a reasonable doubt that a person had committed a serious and dangerous crime, would ignore their instructions and let that person go free. Similarly, there is no evidence to indicate that a jury would convict a person unless they were completely satisfied that he was guilty of a capital offense.

The historical evidence relied upon in Woodson and Roberts to predict that those two statutes would operate

capriciously does not correspondingly support such a prediction with respect to the operation of Alabama's statute. First of all, the offenses made punishable by death under Alabama's statute are very narrowly drawn to include only the most dangerous and serious crimes. The conviction rate is as high as it is because only the most serious and most well-prepared cases are brought under the death statute. More time and effort is expended because of seriousness of the offense and the nature of the crime. If overwhelming evidence was not gathered in support of aggravated murder, the prosecution would use the regular homicide statute, where lesser included offenses would be available.

Secondly, Alabama's statute does not permit the exercise of de facto jury sentencing discretion by allowing convictions for lesser included offenses. The historical evidence about jury nullification was influenced by the fact that it included the results of mandatory death acts which were broadly drafted to include a broad range of crimes. Such historical evidence is also inapplicable to the present case because it was based upon cases brought under statutes which permitted de facto jury discretion through convictions for lesser included offenses.

In summary, Alabama's statute has been carefully drafted to insure the reliability of any guilty verdicts obtained under the act. There is no opportunity for the kind of de facto sentencing discretion which has been held constitutionally impermissible. The way the statute is drafted and the operation of the statute to date indicates that the death penalty will not be inflicted in an arbitrary and capricious manner under the statute.

III.

THE STRUCTURE OF ALABAMA'S DEATH STATUTE INSURES THAT AT LEAST ONE AGGRAVATING CIRCUMSTANCE WILL BE PROVEN BEYOND A REASONABLE DOUBT BEFORE A DEFENDANT CAN BE SENTENCED TO DEATH.

Petitioner argues that because Alabama's death statute does not explicitly require the State to prove the existence of aggravating circumstances beyond a reasonable doubt at the sentencing hearing, and that the statute thereby violates the accused's due process right to require the State to prove his guilt beyond a reasonable doubt.

The statute does require that the State prove to the jury, who determines guilt or innocence, that the defendant is guilty beyond a reasonable doubt. The sentencing hearing is held pursuant to a determination of guilt, and at that point the defendant had had his due process requirement, that he be proven guilty beyond a reasonable doubt, fulfilled.

Under Alabama's death penalty statute, the State has the burden of proving at least one aggravating circumstance. Under Code of Alabama 1975, §13-11-4(1), unless at least one aggravating circumstance is proven the death penalty cannot be imposed. Jacobs v. State, 361 So. 2d 607, 631 (Ala. Cr. App. 1977) ("If the trial judge, in his written findings, determines that one or more aggravating circumstances attended the offense charged, then, and only then, can he impose the death sentence.") The State can, and often will, prove more than one aggravating circumstance, but it must prove at least one or there will be a sentence of life without parole.

Because of the way in which the definitions of the substantive capital offenses overlap with the list of aggravating circumstances, the State must in all, or virtually all, cases prove the existence of at least one aggravating circumstance beyond a reasonable doubt and to a moral certainty. The definitions of capital crimes are set out

in Section 13-11-2(a). The list of aggravating circumstances is contained in Section 13-11-6. They overlap almost completely. For example, in proving a defendant guilty beyond a reasonable doubt and to a moral certainty of any of the four capital crimes defined in Section 13-11-2(a)(1)-(4), the State will have established beyond a reasonable doubt and to a moral certainty the existence of the aggravating circumstance listed in Section 13-11-6(4).

The same is true of the remaining capital offenses defined in the statute. If the State does not prove them beyond a reasonable doubt, then there will be an acquittal. If the State does prove any of them sufficiently to get a conviction, then that same proof will almost certainly establish at least one and often more than one of the aggravating circumstances beyond a reasonable doubt. For example, in the instant case, in order to prove Clyde Cade guilty beyond a reasonable doubt of the capital crime set out in §13-11-2(a)(5), the State necessarily had to prove the defendant guilty beyond a reasonable doubt of the aggravated circumstance set out in §13-11-6(7).

In fact, the State in this case had to go even further than normally required in its case and prove beyond a reasonable doubt that the job-related activity in which the Sheriff was engaged was an arrest, because the indictment specified an arrest. This element of proof is identical to aggravating circumstance number 5, that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest... ." It is possible to strain the imagination and conjure up a theoretically possible case in which there is not a factual overlap between the capital offense proven and at least one of the aggravating circumstances, but this Court's inquiry should be based on reality instead of conjecture and speculation.

The reality is that in proving a defined capital offense beyond a reasonable doubt the State will prove beyond a reasonable doubt an aggravating circumstance. That is all the Constitution requires.

Support for this manner of approaching and resolving the issue is found in Spinkellink v. Wainwright, 578 F. 2d 582, 610 (5th Cir. 1978). In that case, Petitioner argued that Florida's statute was unconstitutional because it did not require proof beyond a reasonable doubt of aggravating circumstances. While not holding that such a standard of proof was constitutionally required, the Fifth Circuit Court of Appeals held that it was provided by the overlap of the Florida statute's definitions of capital offense with its list of aggravating circumstances. The Fifth Circuit opinion in Spinkellink v. Wainwright, 578 F. 2d at 610, quotes and relies upon the following passage from the Florida Supreme Court's decision in State v. Dixon, 283 So. 2d 1, 9:

> "The aggravating circumstances of Fla. stat. § 921.14(6) [sic], F.S.A., actually define those crimes—when read in conjunction with Fla. Stat. §§ 782.04(1) and 794.01(1), F.S.A.— to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

The same is true of Alabama's statute, and the result should be the same also.[1] This Honorable Court need not determine

---

[1]The analogy between Alabama's statute and Florida's statute on this point is particularly apt, because the eight aggravating circumstances in Florida's statute are identical except for a minor difference to the eight aggravating circumstances in Alabama's statute. Compare section 13-11-6 of Alabama's statute with the relevant part of Florida's statute which is quoted in Proffitt v. Florida, 428 U.S. at 248, n. 6. The only difference is that Alabama's fourth aggravating circumstance omits arson, aircraft piracy, and bombing.

whether it is constitutionally necessary that at least one aggravating circumstance be proven beyond a reasonable doubt before a defendant can be sentenced to death. Such a determination is unnecessary, because the structure of Alabama's statute insures that such will be the case.

In any event, the trial court judge who sentenced Petitioner found two aggravating circumstances to exist. The Court found (1) that the capital felony of first degree murder was committed for the purpose of avoiding or preventing a lawful arrest, and (2) that the capital felony was committed to disrupt or hinder the lawful exercise of a government function of the enforcement of the law (R. 76-77). The State was required to prove both of these circumstances beyond a reasonable doubt before the jury.

Under Alabama's statute, after the State has established one or more aggravating circumstances, the defendant and his attorney have a full and fair opportunity to rebut the evidence presented concerning aggravating circumstances and to present any evidence or make any arguments concerning mitigating circumstances. Section 13-11-3; Beck v. State, 365 So. 2d 985, 1002 (Ala. Cr. App. 1978).

Once the sentence hearing has been held the trial court judge, as the sentencing authority, must weigh the aggravating circumstances found against the mitigating circumstances. This weighing process is not a task which lends itself to formalistic rules. As the Alabama Supreme Court noted in Ex Parte: Recardo Cook, ___ So. 2d ___ (Ala. Sept. 15, 1978) (plurality opinion), Ms. Op. at 14:

> "Once all of the proper evidence has been received at the sentencing hearing and arguments have been given, the trial judge must 'weigh the aggravating and mitigating circumstances' and sentence the defendant to death or life imprisonment without parole. §13-11-4, Code of Ala. 1975. This 'balancing' should not, however, be construed to authorize a 'tallying' of items for and against the defendant. We can readily envision

> situations where several aggravating circumstances may not be sufficient to outweigh only one mitigating circumstance and, on the other hand, where numerous mitigating circumstances may be present but opposed to one aggravating circumstance so outrageous as to justify the death penalty. In conducting these hearings trial judges should keep in mind their ability to order presentence investigations and psychiatric evaluations to obtain a full picture of the defendant."

No court has ever held that the sentencing authority must apply a particular standard of persuasion to the sentence decision itself. The Fifth Circuit did not so hold in Spinkellink v. Wainwright, supra. The United States Supreme Court has never so held. The statutes it upheld in Gregg v. Georgia, supra, and Proffitt v. Florida, supra, did not so provide.

If it is ever held that the sentencing decision itself must be made in light of some particular standard of persuasion applied in the sentencing authority's mind, then Alabama's death penalty statute can be so interpreted. See, e.g., Universal Amusement Co. v. Vance, 587 F. 2d 159, 166 (5th Cir. 1978) (en banc); Pugh v. Rainwater, 572 F. 2d 1053 (5th Cir. 1978) (en banc). For now, it should suffice that under any conceivable standard Petitioner was deserving of the death penalty, and no reasonable unbiased person could conceivably have decided the matter differently than the trial court judge in Petitioner's case.

In summary, because of the manner in which Alabama's death penalty statute is drafted, in order to reach the sentencing phase in a case the State will necessarily have had to prove beyond a reasonable doubt at least one aggravating circumstance. Whether ever that much is constitutionally required need not be decided in this case. If it is ever held to be constitutionally necessary to apply any particular standard of persuasion to the sentencing decision itself, then Alabama's statute can be so interpreted.

For purposes of the present case, the sentencing determination involving Petitioner was clearly correct under any standard.

IV.

THE STATUTORY REQUIREMENTS THAT THE JUDGE SENTENCE THE DEFENDANT PURSUANT TO A VERDICT OF GUILT BY THE JURY AND THAT HE CONSIDER THE JURY VERDICT IN WEIGHING THE EVIDENCE DO NOT RENDER THE STATUTE UNCONSTITUTIONAL.

Petitioner argues, in essence, that Alabama's statute should be declared unconstitutional because judges will not perform their sentencing function responsibly.

Alabama's Death Penalty Act requires the trial judge to hold a sentence hearing and carefully weigh the aggravating and mitigating circumstances in each case before deciding whether to sentence the defendant to death or to life imprisonment without parole. Code of Alabama 1975, §13-11-4.

Petitioner contends that because this hearing is held after a verdict of guilt has been rendered by the jury, the trial judge will be unduly influenced by public pressure to uphold the verdict of guilt.

There is no evidence to substantiate Petitioner's speculation that public pressure will cause trial court judges to act improperly. Trial judges are frequently put under great pressure, particularly where controversial cases are involved. But the fact that the judge is under pressure does not invalidate the particular statutes involved in the case. In light of recent public outcry against the death penalty, the State could equally argue that the trial judge is put under a tremendous pressure to reduce a verdict of death to life imprisonment. On page 28 of Petitioner's brief, he gives an example of the

"outcry of unjustified criticism" which he feels will occur whenever a judge fails to sentence to death a defendant convicted under Alabama's capital punishment statute. The example which Petitioner gives does not demonstrate that public pressure will cause judges to act improperly in carrying out their sentencing duties under the capital punishment statute. Instead, that example establishes just the contrary. As Petitioner indicates, the example which he cites was originally given in the dissenting opinion of Justice Jones, below. Jacobs v. State of Alabama, 361 So. 2d 640, 650-651, n. 3 (Ala. 1978) (dissenting opinion). In answering that argument of Justice Jones, the majority opinion of the Alabama Supreme Court, 361 So. 2d at 654, stated:

> "In his original dissent, Mr. Justice Jones stated: 'The majority's judicial review "cure all" obtains even less credence when it is understood that such guided discretion is placed upon a popularly-elected official.' He supports his conclusion dehors the record by citing an example in footnote 3 of his dissent, and states that public comment or clamor will influence trial judges to ignore mitigating circumstances. We hesitate to go outside the record to answer Mr. Justice Jones' conclusion, but we feel constrained to do so, since he infers that elected judges will not do their sworn duty, and will be unduly swayed by public pressure. Since Mr. Justice Jones made his observation, we have been informed that the same trial judge who conducted the trial in the case mentioned by Justice Jones has again sentenced a defendant to life without parole. State v. Eddie Bernard Neal, #78-00639, decided August 7, 1978, 10th Judicial Circuit. We are also informed that a jury in Covington County acquitted a defendant charged under the capital felony statute. State v. David Bronner, #CC 7825, decided April 19, 1978, 22nd Judicial Circuit. Consequently, any suggestion that either judges or jurors will fail to do their sworn duty because of public comment or clamor should not be entertained.

The fact that a trial court judge, who was subjected to what Petitioner and Justice Jones perceived to be such an outcry

of public criticism, later sentenced another defendant to life without parole indicates that trial court judges will not be unduly influenced by public opinion.

The sentencing decisions which trial court judges have made under Alabama's new capital punishment act further evidences that public pressure will not prevent judges from pronouncing non-capital sentences when they feel that the mitigating and aggravating circumstances in a particular case do not justify the death penalty. Under Alabama's new Death Penalty Act, 43 sentence hearings have been held after a defendant pleaded not guilty and was convicted by a jury. In at least 9 of these cases, the trial judge has sentenced the defendant to life imprisonment without parole instead of to death.[2]

There is a sound, logical reason for having the judge, rather than the jury, sentence the defendant, which is stated by the Alabama Court of Criminal Appeals in Beck v. State, 365 So. 2d at 1001, as follows:

> "Under the Alabama death penalty statute, the question of sentence is not considered until the determination of guilt has been made. At that time the trial judge becomes the sentencing authority and uses his experience as a trial judge in applying the mandates of the capital murder statute in assessing and determining the aggravating and mitigating circumstances of the offense. An experienced trial judge is in a better position to face the difficult task of imposing a death sentence because he daily faces the problem of assessing information concerning a defendant who is charged with a crime. He is accustomed to using sentencing information provided by the probation officers in our pardon and parole system."

The Act also directs the judge to consider the jury verdict when weighing the aggravating and mitigating circumstances

---

[2]See Appendix A to this brief, a copy of stipulation between the attorneys for both parties in the habeas corpus appeal of Evans v. Britton, 472 F. Supp. 707 (D.C. Ala. 1979).

at the sentence hearing. The reason for this direction is obvious. In virtually every case, a jury verdict finding a defendant guilty of one of the aggravated offenses listed in §13-11-2(a) will evidence that the jury has found beyond a reasonable doubt the existence of one or more of the statutory aggravating circumstances which §13-11-6 directs the judge to consider in determining the sentence.[3]

The jury's verdict in this case, as in virtually every case, is certainly relevant to the weighing of aggravating and mitigating circumstances, because it establishes that at least one aggravating circumstance exists. The jury verdict in no way forecloses the question of how much weight should be given to the aggravating circumstance that the jury's verdict evidences. The same statutory section that directs the judge to consider the jury's verdict requires that he also consider any matters relating to other aggravating or mitigating circumstances in any and all evidence of probative value for his sentencing decision.

While the jury's verdict of guilty is a necessary step in the sentencing process and will almost always reflect the existence of at least one aggravating circumstance, the judge is the sentencing authority, not the jury. Jacobs v. State of Alabama, 361 So. 2d 640, 644 (Ala. 1978). The consideration of all aggravating and mitigating circumstances is the responsibility of the judge, and no sentence exists until the judge independently weighs the competing considerations and pronounces sentence. Jacobs v. State of Alabama, 361 So. 2d 607, 631 (Ala. Cr. App. 1977); Beck v. State of Alabama, (Ala. Cr. App. April 4, 1978) Ms. Opinion p. 38.

---

[3]For examples, see page 19 of this brief.

Petitioner's argument that the Alabama statute should be declared unconstitutional because judges cannot be expected to perform their sentencing function responsibly is closely analogous to the argument that capital punishment statutes are inherently arbitrary and capricious because prosecutors cannot be expected to exercise their prosecutorial and plea-bargaining powers properly. This Court has rejected that argument many times. Gregg v. Georgia, 428 U.S. 153, 199 (1976) (joint opinion by Justice Stewart, Justice Powell, and Justice Stevens); Id. at 224-225 (concurring opinion of Justice White, joined by Chief Justice Burger, and Justice Rehnquist); Proffitt v. Florida, 428 U.S. 242, 254 (joint opinion of Justice Stewart, Justice Powell, and Justice Stevens); Id. at 261 (concurring opinion of Justice White, joined by Chief Justice Burger, and Justice Rehnquist); Jurek v. Texas, 428 U.S. 262, 274 (joint opinion of Justice Stewart, Justice Powell, and Justice Stevens); Id. at 278-279 (concurring opinion of Justice White, joined by Chief Justice Burger, and Justice Rehnquist). Just as this Court has rejected the argument that prosecutors will perform their duties improperly, so also should it reject the suggestion that this Court assume that trial court judges will discharge their sentencing duties in an improper and irresponsible manner.

V.

ALABAMA'S DEATH PENALTY STATUTE ALLOWS THE SENTENCING AUTHORITY TO CONSIDER AS A MITIGATING FACTOR ANY ASPECT OF A DEFENDANT'S CHARACTER AND RECORD, ANY OF THE CIRCUMSTANCES OF THE OFFENSE, AND ANY OTHER RELEVANT EVIDENCE IN MITIGATION THAT THE DEFENDANT PROFFERS AS A SENTENCE LESS THAN DEATH.

Under Alabama's Death Penalty Act, if the jury finds the defendant guilty, the trial judge is required to hold a

separate sentence hearing for the purpose of determining the appropriate punishment for that specific defendant. Code of Alabama 1975, §13-11-3. The statute states that the purpose of this sentence hearing is, "...to aid the court to determine whether or not the court will sentence the defendant to death or to life without parole."

Petitioner's contention is that the sentencing authority can only consider those mitigating circumstances which are set out in Code of Alabama 1975, §13-11-7 in determining whether a sentence of death should be imposed on a particular defendant. Petitioner argues that since §13-11-4 requires that the sentencing authority must weigh the mitigating circumstances which are enumerated in §13-11-7, and since that section says that certain considerations "shall be" the mitigating circumstances, then the sentencing authority is limited in considering the mitigating factors. However, Petitioner's argument does not give due credit to the provisions of §13-11-3, which state:

> "In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7." [Emphasis added]

The statute further provides that any evidence which the Court deems to have probative value may be received. As this statutory language itself makes clear, the sentencing authority in Alabama is in no way precluded from considering as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

As evidence of this broad range of considerations which are open to the sentencing authority, the trial judge in the instant case stated in his findings that he

had considered the circumstances of the case, together with the character and propensity of the defendant, as well as the aggravating and mitigating circumstances in finding that the death sentence should be imposed.

Petitioner contends that the provision which allows the judge to consider factors other than the enumerated mitigating circumstances has no real meaning because the trial judge cannot give these factors "independent mitigating weight." This argument ignores the construction and interpretation which has been given these statutory provisions by the Alabama Supreme Court.

After the Alabama Supreme Court had upheld the constitutionality of the Alabama Death Penalty Act in Jacobs v. State, 361 So. 2d 607 (Ala. 1978) this Honorable Court handed down its decision in Lockett v. Ohio, 98 S. Ct. 2954 (1978). Jacobs thereafter asked the Alabama Supreme Court to reconsider its decision in light of the Lockett case. In denying Petitioner's application for rehearing, the Alabama Supreme Court had an opportunity to interpret and construe the sentencing provisions of the Alabama Death Penalty Act in light of this Court's holding in Lockett. The Alabama Supreme Court extended its original opinion, in Jacobs, 361 So. 2d 640, 652-654, and in doing so stated as follows:

> "We deny petitioner's application to rehear this case but we point out that we have examined the cases of Bell v. Ohio, ___ U.S. ___, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 and Lockett v. Ohio, ___ U.S. ___, 98 S. Ct. 2954, 57 L. Ed. 2d 973, decided after petitioner's application for a rehearing was filed, and we conclude that those cases do not invalidate Alabama's sentencing scheme in death cases. Alabama's sentencing scheme specifically provides, in part:
>
> > "...in the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and it shall include any

> matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. ..." (Emphasis added) (§13-11-3, Code, 1975).

The Alabama Supreme Court added the emphasis to that part of the statute. In view of that provision of the statute, the Alabama Supreme Court, on rehearing, concluded:

> "It is readily apparent, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances, and does not contain the deficiencies the court found were inherent in Ohio's scheme." (Emphasis in original).

Therefore, the Alabama Supreme Court has construed Alabama's sentencing scheme in death cases to allow the sentencing authority to consider any relevant evidence in mitigation, and this complies with the holding in Lockett.

The Alabama statute is significantly different from the Ohio statute that was struck down in Lockett, supra. The plurality opinion in Lockett, in commenting on the Ohio statute, noted that:

> "The absence of direct proof that a defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it shed some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted as such, to affect the sentencing decision." 98 S. Ct. at 2967.

The very mitigating factors specified in the above quotation from the plurality opinion in Lockett, are expressly set out as separate and independent mitigating factors in the Alabama statute. For example, the absence of direct proof that the defendant intended to cause the death of the victim is expressly covered in Code of Alabama 1975, §13-11-7(4). The consideration of a defendant's comparatively minor role in the offense is also expressly covered in §13-11-7(4). The defendant's age is expressly covered in §13-11-7(7).

In addition to the fact that the Alabama Act has much broader statutory mitigating factors, the Alabama Supreme Court has construed the Act to allow the sentencing authority to consider any relevant evidence in mitigation, regardless of whether or not that evidence is expressly covered in the statutory list. Jacobs v. State of Alabama, 361 So. 2d 640 (Ala. 1978); Ex Parte: Recardo Cook, (Ala. September 15, 1978); Gilbert Franklin Beck v. State of Alabama, (Ala. Cr. App. April 4, 1978).

Not only is the Alabama statute constitutionally different from the Ohio statute struck down in Lockett, but it is constitutionally similar to the statutes upheld in Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976), and Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). When the Ohio sentencing scheme was struck down in Lockett, supra, the plurality opinion was careful to distinguish the statutes upheld in Gregg v. Georgia, 428 U.S. 153 (1976), and its companion cases from the Ohio statute. As the opinion stated:

> "...none of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any aspects of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Lockett v. Ohio, 98 S. Ct. at 2966.

The companion cases of Gregg included, of course, Jurek v. Texas, 428 U.S. 262 (1967) and Proffitt v. Florida, 428 U.S. 242 (1976). The Alabama sentencing provisions are at least as constitutionally broad as the Texas and Florida provisions which were upheld in Jurek, supra, and Proffitt, supra.

The Proffitt case, supra, demonstrates the constitutionality of Alabama's sentencing provision. The Florida statutory provision, which was upheld in Proffitt, supra, Fla. Stat. Ann. §921.141(6) entitled MITIGATING CIRCUMSTANCES,

provides that "Mitigating circumstances shall be the following: ..." and then goes on to list seven statutory mitigating factors. The Alabama provision, Code of Alabama 1975, §13-11-7, entitled MITIGATING CIRCUMSTANCES, provides that, "Mitigating circumstances shall be the following: ..." and then goes on to list seven statutory mitigating factors. Not only is the introductory language in these two corresponding provisions identical, but the actual mitigating circumstances themselves in the Florida and Alabama statutes are identical.

In distinguishing the Florida statute which was upheld in Proffitt from the Ohio statute which was struck down in Lockett, the Lockett plurality observed:

> "...Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. ..." Lockett v. Ohio, 98 S. Ct. at 2966.

The assumption the six members of the Court made in Proffitt and which the Lockett plurality found controlling, is an actual fact in this case. This Court need not assume that the Alabama statute will be interpreted so that the range of mitigating factors listed in the statute is not exclusive. No assumption is necessary, because the Alabama Supreme Court has already ruled that the statutory factors are not exclusive. The Alabama Supreme Court has already ruled in Jacobs v. State of Alabama, supra, that the Alabama statute allows the sentencing authority to consider as a mitigating factor any aspect of a defendant's character and record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death. For this reason, and on the authority of Jurek, supra, Proffitt, supra, and Lockett, supra, the sentencing provisions contained in the Alabama Death Penalty statute are constitutional.

VI.

THE ALABAMA APPELLATE COURTS EXERCISE COMPARATIVE APPELLATE REVIEW OF SENTENCES IN CAPITAL CASES AND INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AT THE APPELLATE LEVEL TO INSURE PROPER SENTENCING.

All capital cases in which the death penalty is imposed at the trial court level are automatically appealed to and reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. This is true even if a defendant does not want his conviction and sentence reviewed on appeal. His case is appealed automatically and fully reviewed at both appellate levels anyway. Evans v. State, 361 So. 2d 666, 667 (Ala. 1978). Capital cases in which the defendant was convicted and received a sentence of life without parole are appealed to and reviewed by the appellate courts only if the defendant elects to do so. Some do. E.g., Eddie Barnard Neal v. State, ___So. 2d ___ (Ala. Cr. App. May 1, 1979); Roosevelt Youngblood v. State, ___ So. 2d ___ (Ala. Cr. App. March 6, 1979); Leslie Evans v. State, 362 So. 2d 1284 (Ala. Cr. App. 1978).

Whether appellate review of sentencing decisions in capital cases is constitutionally necessary is uncertain. From a portion of the opinion in Gardner v. Florida, 430 U.S. at 361, it would appear to be. However, the United States Supreme Court opinion in Jurek v. Texas, 428 U.S. 262 (1976), which upheld the constitutionality of the Texas capital punishment statute is conspicuously silent on the question of appellate review of sentencing decisions. In any event, Alabama has a careful system of appellate review of death sentences which insures that the death penalty will not be inflicted arbitrarily or capriciously under its statute.

In Alabama, appellate review of sentencing in capital cases involves three functions or inquiries: (1) review of

the sentencing process in the trial court to insure that the sentence hearing was conducted properly, that complete written findings were entered, and that statutory provisions concerning aggravating and mitigating circumstances were properly interpreted and applied; (2) independent weighing of the aggravating and mitigating circumstances at the appellate level; and (3) comparative appellate review of the sentence result with the result in other capital cases. All three of these types of appellate review serve to insure, either directly or indirectly, that capital sentencing in Alabama is not arbitrary or capricious.

Alabama appellate courts meticulously search the record in capital cases to insure that the sentencing process was conducted properly. In remanding for a new sentence hearing in Ex Parte: Recardo Cook, ___ So. 2d ___ (Ala. Sept. 15, 1978) (plurality opinion), Ms. Op. at 9, the Alabama Supreme Court noted, "...it is the duty of this court to insure that no error has tainted the trial or the sentencing process." Alabama's appellate courts have diligently discharged that duty.

Consistency in the application of the death penalty is served by the uniform interpretation and application of statutory provisions concerning aggravating and mitigating circumstances. Alabama's appellate courts have sought to insure such consistency by reversing sentences of death and remanding cases for new sentence hearings and determinations where trial courts have misapplied or misinterpreted aggravating and mitigating circumstances. Examples of cases involving sentences of death which were remanded for new sentence hearings and determinations for that reason include Ex Parte: Recardo Cook, supra; Woodrow Wilson Keller, Jr. v. State, ___ So. 2d ___ (Ala. Cr. App. Feb. 20, 1979); See also, Ashlock v. State, 367 So. 2d 560, 561 (Ala.

Cr. App. 1979). In Woodrow Wilson Keller, Jr. v. State, supra, Ms. Op. at 17, the Alabama Court of Criminal Appeals strongly admonished trial courts against any inclination to gradually broaden the scope of aggravating circumstances beyond the strict wording of the statute.

Alabama's appellate courts have also insisted that trial court judges fully comply with the requirement of Code of Alabama 1975, §13-11-4 that complete written findings of fact from the trial and sentence hearing be entered before a capital sentence is pronounced. Cases which have been remanded for a new sentence hearing because complete written findings were not entered in the original sentence determination include J. B. Hubbard v. State, ___ So. 2d ___ (Ala. Cr. App. May 1, 1979); Willie Lewis Mack v. State, ___ So. 2d ___ (Ala. Cr. App. July 25, 1978); Herbert Lee Richardson v. State, ___ So. 2d ___ (Ala. Cr. App. Oct. 3, 1978); see also, Ashlock v. State, supra.

Requiring that a proper sentence hearing be held and that complete written findings be entered serves the goal of consistency in application of the death penalty. It does so, because it makes appellate review of the substantive sentencing decision itself possible. The Alabama Court of Criminal Appeals explicitly recognized this in remanding for a new sentence hearing in Willie Lee Mack v. State, supra, Ms. Op. at 46, where it stated:

> "The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances

> must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done, 'the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision."
>
> "Prior to the date set for the hearing the trial court shall order a presentence report and furnish the defendant and his attorney with a copy of same. The defendant must be afforded the opportunity to adduce any testimony which has any probative value that will enable the court to perform its constitutional responsibility for the question of whether a man should live or die is not to be treated as a mere formality." (Emphasis added)

See also, Herbert Lee Richardson v. State, supra, Ms. Op. at 32-33.

The purpose of the requirement that complete written findings be made in any sentence determination is to facilitate appellate review of the appropriateness of any sentence of death. Jacobs v. State, 361 So. 2d 640, 646-647 (Ala. 1978) (separate opinion by Chief Justice Torbert). Mandatory appellate review, provided by Code of Alabama 1975, §13-11-5 and Alabama Rule of Appellate Procedure 39(c), are also important. As Chief Justice Torbert has noted, "This mandatory review guarantees that, before a defendant can be executed in Alabama, the sentence of death must be found to be appropriate by both the Court of Criminal Appeals and this court after a review of the aggravating and mitigating circumstances found in the case by the trial judge." Jacobs v. State, supra, (emphasis added). In petitioner's own case, the Alabama Supreme Court recognized a "dominant and overriding interest in ensuring that the death penalty is imposed only for utmost of compelling legal reasons," an interest enforceable at the appellate level. Evans v. State, 361 So. 2d at 667.

Appellate review of the substantive sentencing decision itself in death cases does exist in Alabama and it is done

in two ways—independent appellate weighing of the aggravating and mitigating circumstances to determine the appropriateness of the sentence and comparative review at the appellate level of the sentence with others which have been reviewed in similar cases. As the Alabama Court of Criminal Appeals explained in Beck v. State, 365 So. 2d 985, 1000 (Ala. Cr. App. 1978):

> "Under the new Alabama death penalty statute, the defendant has a second chance for life with the trial judge, a third with Court of Criminal Appeals, and a fourth with the Supreme Court of Alabama. Not only are decisions of the trial judge in death cases reviewed to insure a fair and impartial trial, but they will insure consistency and uniformity of sentencing."

An example of a recent case in which the independent weighing of aggravating and mitigating circumstances at the appellate level was expressly revealed in the opinion is Roger Scott Thomas v. State, ___ So. 2d ___ (Ala. Cr. App. March 27, 1979) Ms. Op. at 19, where the Court of Criminal Appeals noted:

> "The trial judge in his order noted the aggravating circumstances, which were here averred and proved at trial, and also determined by the trial judge in the postsentence hearing, as required by law. Additionally, this Court has carefully weighed the aggravating and mitigating circumstances independently.
>
> "We are of the opinion that the punishment here imposed fits the crime for which the appellant has been found duly guilty." (emphasis in original) (footnotes omitted)

Another example is Beck v. State, 365 So. 2d at 1005 where the appellate court stated:

> "We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty."

The appropriateness of the sentence in view of all the facts and circumstances was also noted in Herbert Lee Richardson v. State, supra, Ms. Op. at 39-40.

In the very recent opinion of Eddie Barnard Neal, supra, Judge Bowen of the Court of Criminal Appeals explained, Ms. Op. at 29 (concurring opinion):

> "The import of Jacobs v. State, 361 So. 2d 607 (Ala. Cr. App. 1977), affirmed, 361 So. 2d 640 (Ala. 1978), and Clements v. State, Ala. Cr. App., 7 Div. 575 (Ms. May 16, 1978), reversed on other grounds, Ala. 77-643 (Ms. April 17, 1979), is that this court must independently weigh the aggravating and mitigating circumstances to determine whether they are sufficient to support a sentence of death."

No member of the Alabama Court of Criminal Appeals and no member of the Alabama Supreme Court has ever expressed any doubt about this or made any suggestion to the contrary.

Alabama appellate courts also exercise comparative appellate review of sentences in capital cases. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), was the first case under Alabama's new death penalty statute which reached the appellate level. Since there were no other cases under the new act with which to compare the sentence on appeal, Alabama's appellate courts compared it to sentences in pre-Furman cases under Alabama's old capital punishment statute. The United States Supreme Court has recognized that such a practice is necessary and appropriate at the inception of a new capital punishment statute. Gregg v. Georgia, 428 U.S. 153, 204, n. 56 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.). In performing its comparative appellate review function, the Alabama Supreme Court stated:

> "The Court of Criminal Appeals has spelled out specifically how death sentences, reviewed under Alabama's

> automatic appeal statute, have been reversed and the cause is remanded for new trials. This Court has carefully reviewed each point raised by the accused in his petition, which was granted as a matter of right because of the sentence of death. We are familiar with other cases reviewed by this Court in the last decade involving death sentences and we are convinced that the sentence here was not arbitrarily or capriciously entered. ..." Jacobs v. State, 361 So. 2d at 644.

In Roy Frank Clements v. State, 370 So. 2d 708 (Ala. Cr. App. May 16, 1978), rev'd on other grounds Ex Parte: Roy Frank Clements, ___ So. 2d ___ (Ala. Jan. 26, 1979), the Alabama Court of Criminal Appeals was presented with the argument that Alabama's statute did not provide for a comparative appellate review. In rejecting that argument, Ms. Op. at 8-9, the Court said:

> "As Judge Harris pointed out in Jerry Wayne Jacobs, supra, the Supreme Court of Alabama, in the past thirty-five years, has reviewed approximately ninety-five death cases and has reversed twenty-five of them for various reasons, including excessive punishment, and also where the verdict was contrary to the great preponderance of the evidence.
>
> "This court in Evans and Ritter v. State, Ala. Cr. App., 1 Div. 837, Ms. October 25, 1977, expressly pointed out that we would also weigh the aggravating and mitigating circumstances independently. Therefore, appellant's contention is without merit."

Since the time of the Alabama Supreme Court's review of the sentence in Jacobs v. State, supra, and the Alabama Court of Criminal Appeals opinion in Roy Frank Clements v. State, supra, more death penalty cases have reached the appellate level. This has made possible a comparison of the sentence under review with other sentences which have been reviewed under the same statute. An example of a case in which this comparative appellate review was explicitly performed in an appellate opinion is Beck v. State, 365 So. 2d 985, 1005 (Ala. Cr. App. 1978), aff'd 365 So. 2d 1006, where the Alabama Court of Criminal Appeals held:

> "We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.
>
> "The facts in this case, after a careful evaluation, show a marked similarity with those in Jacobs v. State, supra.
>
> "It seems to us that the result is inescapable that the punishment, too, should be the same."

In summary, all capital cases in which a sentence of death is imposed upon a defendant are automatically reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. These two appellate courts independently weigh the aggravating and mitigating circumstances to determine the appropriateness of the sentence. Comparative appellate review is also performed at the appellate level.

VII.

ALABAMA'S DEATH PENALTY ACT DOES NOT PROVIDE A MANDATORY SENTENCING PROCEDURE.

Petitioner's argument that both the judges and juries acting under Alabama's capital statute automatically impose the death sentence upon conviction for certain offenses is really a gathering of the arguments in previous sections of his petition, and are, again, unfounded.

Petitioner claims that the statute is mandatory because jurors are required, upon conviction, to "fix the punishment at death." As explained fully in section II of this brief, even though the statute is phrased such that the jury must "fix the punishment at death," this is only an adjudication of guilt and not a sentence. The jury's function under the Alabama statute is to determine guilt or innocence. Jacobs v. State, 361 So. 2d 607, 631 (Ala. 1978). While a jury verdict of guilt is a necessary step

in the sentencing process, the judge is the actual sentencing authority. Jacobs, supra, at 640. No sentence exists until the judge pronounces one after he has held a post-conviction sentence hearing. Beck v. State, 365 So. 2d 985, 1005 (Ala. Cr. App. 1978).

Petitioner further alleges that the statute is mandatory because the trial judge acts as a "rubber stamp" for the jury verdict at the sentencing hearing and fails to give individualized consideration to every defendant. This allegation is refuted in sections IV and V of this brief. Petitioner claims that there is an 86% death sentence rate in Alabama capital punishment cases and that there is no individualized consideration of the character and record of a particular offender or the circumstances of a particular offense. Petitioner offers no further proof to substantiate this claim. Undoubtedly, the claim cannot be substantiated. In the present case, for example, there was a lengthy sentencing hearing in which the judge was presented with a great deal of information regarding the character and record of Clyde Cade. Of course, most of the evidence was presented by the State because the Defendant chose not to introduce character evidence at that hearing.

The evidence showed that Cade had a long, long record, including offenses involving extreme violence. The judge can only consider such evidence of character as is presented to him. He did consider character and prior record, as his sentence reflects. Further, Respondent submits that the 86% death sentence rate is not accurate, but even if it were, it substantiates the position that the statute is not mandatory.

Finally, Petitioner claims that the Appellate Courts simply act as a rubber stamp for the trial court and fail to exercise comparative review of sentences. This claim

is disproved in the preceding section, section VI, of this brief.

By definition, under a mandatory death penalty act all defendants convicted of a capital offense are sentenced to death. Under Alabama's statute, the trial judge must hold a sentencing hearing and, after hearing aggravating and mitigating circumstances, can sentence a defendant to life imprisonment without parole.

As Justice Jones of the Alabama Supreme Court notes in his dissenting opinion (amended version) in this case, of the 65 death penalty convictions returned as of the date of his opinion, 22 of those defendants were sentenced to life imprisonment without parole. Of the 22 cases in which a defendant was sentenced to life without parole, 13 were the result of a negotiated guilty plea and agreement at trial. In the remaining 9 cases, the defendant was convicted at trial on a plea of not guilty and was then sentenced by the judge to life without parole.[4] These statistics prove that Alabama's act is not mandatory and that, even though a defendant is convicted under the act, he may receive a sentence of life imprisonment without parole.

VIII.

THE TRIAL JUDGE DID NOT CONSIDER THE JURY'S DEATH SENTENCE AS AN AGGRAVATING CIRCUMSTANCE IN FIXING THE PUNISHMENT AT DEATH.

The trial judge made extensive findings at the sentencing hearing. To say that he relied on the verdict of guilty by the jury in sentencing Cade would be an obvious exaggeration or

---

[4]For a more complete breakdown of the results in Alabama death cases, see attached Appendix A.

misrepresentation of what appears in the record. The judge had not one, but two aggravating circumstances upon which to base the sentence of death. The fact that he mentioned the jury verdict in his summary of the total circumstances of the case can in no way be construed to mean he relied upon it. Of course, it is a part of the totality of the circumstances of the case, and that is the context in which it is mentioned. It would be ludicrous to pretend that the judge is not conscious of the jury verdict.

Justice Jones recognizes this and states, at p. 3 of his dissent in the Alabama Supreme Court's opinion, that "...I am not saying...that the trial judge does not, or should not, consider the verdict of guilty (otherwise the bifurcated sentencing hearing would not take place)..."[5] Justice Jones' primary objection seems to lie in the fact that the jury's verdict of guilty includes a pronouncement of death, and that the judge is aware of this pronouncement.

However, the trial judge is certainly aware that the pronouncement of death by the jury is only a formality to impress upon them the seriousness of their decision. There is absolutely no basis for concluding that the trial judge considered the fixing of punishment by the jury as an aggravating or mitigating circumstance. Here we respectfully disagree with Justice Jones.

The trial judge's language, in his written findings, is couched in the identical terms of §13-11-4, which states that the court, "...after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death." The trial judge was obviously trying to comport with the language of the statute when he wrote, "The Court

---

[5]Attached as Appendix B to Petitioner's petition.

...after weighing the aggravating and mitigating circumstances and the punishment of death by the jury, finds the defendant, Clyde Cade, should be sentenced to death."

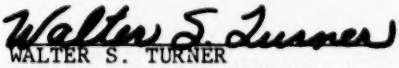
The fact that the defendant had been sentenced was a factor the trial judge considered apart from the aggravating and mitigating circumstances. He stated that he weighed the aggravating and mitigating circumstances and the sentence of death. The jury verdict was mentioned in passing as a part of the summation of the stature of the case at the time Petitioner was sentenced. There is no support for an assumption that the trial judge went through the process of an extensive aggravation/mitigation hearing only to parrot the verdict of the jury. Such an assumption has no support in the record or in the written findings of the trial judge.

CONCLUSION

Based on the foregoing argument, Respondent submits that the Petition for Certiorari is due to be denied.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL



WALTER S. TURNER
CHIEF ASSISTANT ALABAMA
ATTORNEY GENERAL

LINDA C. BRELAND
ASSISTANT ALABAMA ATTORNEY
GENERAL

ATTORNEYS FOR RESPONDENT

ADDRESS:

Office of the Attorney General
250 Administrative Building
Montgomery, Alabama 36130

CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of November, 1979, I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for Petitioner, by mailing a copy of the same to him, postage prepaid, and properly addressed as follows:

Honorable G. Stephen Wiggins
P. O. Box 1939
Tuscaloosa, Alabama 35403

Linda C. Breland

LINDA C. BRELAND
ASSISTANT ALABAMA ATTORNEY GENERAL

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

U. S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE

MAY 14 1979

WILLIAM J. O'CONNOR
CLERK

JOHN LOUIS EVANS, III,
Petitioner,

v.

ROBERT G. BRITTON, ET AL.,
Respondents.

CIVIL ACTION NO. 79-0200-H

FIRST STIPULATION

The parties agree and stipulate as follows:

1. The Alabama Death Penalty Statute, Code of Alabama 1975, §§13-11-1 through 13-11-9, has been in effect since March 7, 1976. The remaining paragraphs in this statute describe the operation of the statute from that date to the present.

2. There are sixty-five (65) cases in which defendants have received a sentence hearing and been sentenced. In fifty-two (52) of these cases, the defendants were convicted by a jury after pleading not guilty. In the remaining thirteen (13) cases, the defendants were convicted on guilty pleas.

3. Of the sixty-five (65) cases in which defendants have been sentenced under the act, forty-three (43) resulted in death sentences and twenty-two (22) resulted in sentences of life without parole.

4. Of the twenty-two (22) cases in which a defendant was sentenced to life without parole, thirteen (13) were the result of a guilty plea and agreement at trial and the sentence hearing. In the remaining nine (9) cases, the defendant was convicted at trial on a plea of not guilty and was sentenced to life without parole.

5. In all of the nine (9) cases in which the defendant was convicted on a guilty plea at trial and received a sentence of life without parole, there was no agreement between the District Attorney and the defendant or his counsel to the sentence. However, in two (2) of these cases the District Attorney did not oppose the sentence of life without parole because the family of the victim recommended it. In the remaining seven (7) of these cases the sentence of life without parole was given over the active opposition of the District Attorneys involved.

6. The seven (7) cases in which defendants received sentences of life without parole over the active opposition of the District Attorney involved four different judges. One of the judges was responsible for three of the sentences, another judge was responsible for two of the sentences, and the remaining two sentences were given by two other judges.

7. There have been two (2) acquittals and three (3) mistrials in five different cases brought under the statute. Two of the mistrials have not been retried as of this date. The other mistrial was retried and the defendant was convicted and sentenced to death.

8. There have been four (4) cases in which defendants who were originally indicted for a capital offense under the statute were not brought to trial on that indictment but pursuant to an agreement were instead re-indicted and pled guilty and were convicted of a non-capital offense under another statute.

All of the preceding paragraphs are agreed and stipulated by the parties and their attorneys to be true and correct.

JOHN L. CARROLL

FOR THE PETITIONER

ED CARNES
ASSISTANT ALABAMA ATTORNEY GENERAL

FOR THE RESPONDENTS